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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1275.

UNITED STATES,
Petitioner,

vs.

BILLY PRESTON KEATTS, ET UX.

ANSWER

To Petitioner's Petition Asking for a Writ of Certiorari to be Issued to the United States Court of Appeals for the Sixth Circuit.

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It seems to the landowners herein that the petitioner is seeking to sustain technicalities a great deal more than they are seeking justice to be done to the landowners. They attack the right of the Trial Judge in whose Court the Commission was appointed, and received its Report, by stating that the District Court had no authority to add any amount to the amount found by the Commission, and cite to support the same Rule 53 (e) (2). Now this rule reads as follows:

> "The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Now this rule expressly provides that the Court to which the Report of the Commission is made has authority to modify it or to do several other things. Trial Judge Miller thoroughly determined by an opinion written by him that he knew his duty. He states in his findings just what the law requires, namely, that the finding of the Commission must have been "clearly an error", and being familiar with the rule also that he had a right to modify the Report of the Commission, which would be to the interest, as he thought, of justice and fairness to both sides. He added only $5,550.00 to the amount reported by the Commission, which made a total of $29,500.00. He stated in his opinion, after he had had a full hearing on the same, as the rule provides, that he had the right when it was so clear as this one was, that the landowners were entitled to more money than the Commission gave to them.

Now the truth of the purpose of this lawsuit is only for one purpose. There being no objection to the petitioner's right to condemn, there was only one issue involved, and the case was filed for only one purpose, namely, to ascertain just compensation to the landowner. This very language has been used in Federal Court decisions concerning cases of condemnation. The Court in the case of **U. S. v. 93,970 Acres, More or Less, Cook County, Ill.**, 258 F. (2d) 17, said:

> "The sole object of condemnation proceedings is to ascertain just compensation for that which is taken."

Now, as we said above, it seems that the Government is more interested in seeing that the technicalities mentioned

in their pleading are preserved than they are in the landowners getting what they are entitled to. It is indeed very clear that the amount reported by the Commission was indeed insufficient and far less than the actual market value of the land taken and not taken but damaged. To illustrate this point, of the 188 acres of land there were 36 acres that were not taken, but it was agreed by the petitioner at the trial that the Government was due to pay for the 36 acres because it could not be gotton to on account of being cut off by the water. Now, the record shows beyond any doubt that the landowner had cultivated certain portions of these 36 acres of upland for the raising of tobacco, and had been doing so for a good many years, and he had 3.35 acres of dark-fired tobacco allotment and 1.09 acres of burley tobacco, which he raised every year on these 36 acres. These four acres alone of the 36 acres brought the landowner from $5,000.00 to $6,000.00 per year. There was also on these 36 acres a rather unusual tenant house of 40 ft. x 16 ft., weatherboarded, metal roof, and hardwood flooring inside, and was in perfect condition. There was also a good, big barn on these 36 acres used as a tobacco barn. Now the value of this land was placed by two of the so-called witnesses of the petitioner as being worth $40.00 an acre. The other witness of the petitioner fixed it at $50.00 an acre, and the two stated that it was entirely destroyed and could not be gotten to, and said that it was $40.00 an acre that the landowner should be allowed. The other witness for the landowner said it was damaged $25.00 per acre, leaving it worth $25.00 per acre, according to him. The other part of the farm contained at least 80 acres of very high grade, valuable creek bottom land, and it was proven beyond a shadow of a doubt that the bottom land was cultivated in corn most every year, and averaged at least 100 bushels of corn per acre, and this is not simply an opinion, but proven beyond a doubt that it produced at

least 100 bushels of corn per acre every year and had for many years prior thereto.

Now one of the witnesses that testified for the petitioner stated that the whole farm was worth $109.00 per acre. Another one testified that it was worth $102.00 per acre. And the other one testified it was worth $100.00 per acre, that is, the one witness above mentioned testified the full value of the whole farm before taking was $20,500.00, which is $109.00 and some cents per acre. The other testified that it was worth $19,300.00, which is $102.00 and some cents per acre, and the other one testified that it was worth before being taken $18,837.00, which is $100.00 and some cents per acre.

The proof of the landowner was made by men who had known this land from the time they were children, owning farms very close thereto, and had seen their crops, as they testified, every year since they were six years old, and they were in their 60th year. One of them testified that the land before taking was worth $62,000.00, and the small amount that was left, which included the home where he lived and 9 acres not suited to cultivation was worth $5,000.00, which left $57,000.00 that the landowner should have been given. Number 2 testified that it was worth $61,000.00 before taking, and that the small amount left, including the home was worth $3,000.00 and, therefore, the landowner should have had $58,000.00, according to him. Another one testified that the farm was worth, in his judgment, $50,000.00 before taking, and the land that was left was worth $3,000.00, and the landowner should have had $47,000.00. Another one testified that it was worth $61,000.00 before taking and $3,250.00 after taking, that is, the house and 9 acres, which would have left $57,750.00, in his judgment, that the landowner should have had. The fifth one testified that the land, in his judgment, was worth $55,000.00 before taking, and $4,000.00 for that 9 acres

that were left, which left $51,000.00 that the landowner should have had.

Now these are high class men. There is no reason in the world that they should have testified in any manner except the truth, and that they knew all about this farm during their whole life and still lived on the farm very close thereto, and they were both considerably above 58 years of age.

Now the witnesses offered by the petitioner on the trial showed very clearly and positively and affirmatively that they knew nothing whatsoever about this land. They never saw it until all three of them went together in the month of March, 1965, which was three years and three months after the land was taken. They did not see the land on that day. They drove up in front of the home in a car, and the landowner came out and sat in the car with them and talked to them. They could not see the land that time because it was covered up with water. The ones in charge of making the dam was trying it out by closing it and damming the water, and these 88 odd acres of bottom land were covered more than once. The three witnesses and the landowner sat in the car in front of the house, from where they could not see but very little of the land. Now when they came back on the land, and when they made their appraisal the latter part of March, 1965, they said they could not go over the land then and did not. The water had gone down from the land, but left it very wet and muddy, and they could not get over it. They went to the edge and looked at it, and that's on which they made their appraisal. These three witnesses lived thirty miles from this land. They knew nothing about the land.

The amount of the improvements in the way of buildings on that farm was indeed very unusual. There were two tenant houses, one as described above, and the other one having been used for the past few years for the curing

of tobacco. The other tenant house was indeed an unusual one. There were also several cribs where the corn was placed when gathered on this land. He cultivated the bottom land each year, from 65 to 70 acres of it in corn. The other part of it he had grown grass and cut hay thereon for cattle. Therefore, it appears that the amount fixed by the Commission of $23,950.00 is as clear as the noonday sun as being "clearly an error." I can't understand how it could possibly be more certain that it was insufficient than it was clearly to everybody, and more especially to the District Judge.

Now it also developed that these three witnesses that were disqualified did not go inside or even close to any of the buildings. They stated they did not go into a single building, and yet put a price value on them, looking at them at a distance. Judge Miller was not a novice when he declared this Report of the Commission to be "clearly an error." He was a Judge who had tried hundreds of condemnation cases, in which the lawyer dictating this Answer to the Petition filed participated in many of them. The landowners' witnesses described clearly the productivity of this land. They described the buildings that were on it, and they described the location of the land just a short distance off of a paved road, and testified that it was known as the best farm in that community for many years, and the Judge did not use the testimony of the witnesses of the landowner, but fixed his value from the proof in the record with reference to the type of land that it was, its location, its productivity, and also taking into consideration especially the landowners' receipts from the same by reason of the fertility of the bottom land and the raising of tobacco on the 36 acres and the buildings, which gave him a pretty complete idea, as he thought, to not use the testimony of any of the witnesses on either side as controlling, but the general information given as to the value of the land.

These defendants further state and insist that the statement of the petitioner on page 13 and Appendix A to its Petition filed, first, by quoting what one of the Commissioners said, as follows:

> "I think, in view of the fact that you (defendant) are making the motion (to strike the testimony), you would bear the burden of showing the testimony is clearly incompetent. We must consider it as being competent until proven otherwise."

Now the Petition further states following immediately the quotation above given, as follows:

> "This view is erroneous since the Government, if it offers expert witnesses, has the burden to qualify them so that they may be permitted to express an opinion. One essential is to show that the witnesses' opinions are based upon the relevant facts as they existed on the date of taking. The Commission, as stated, apparently gave some weight to the testimony of the Government witnesses in arriving at its valuation since no other evidence appears in the record to support it. This error would call for a remand to the Commission for further proceedings unless the record is adequate for the Court to arrive at a figure representing just compensation."

Now this amounts to an admission on the part of the petitioner that the conduct and action on the part of the Commission was clearly an error, and they claim that it gave the Court the right, as they had said before, under Rule 53 (e) (2), to remand the case to the Commission. Now how in the world that anybody can say that this was an error on the part of the Commission, and then say that it only created the right on the part of the District Judge to remand the case to the Commission. When as a matter of fact, in the wording of the rule the very first one gives to the District Judge the right to "modify," which

could mean nothing else than if he determines the facts are sufficient for him to arrive at the value that he can also either add to or subtract from, either and both of which are included in the word "modify". Therefore, we insist that the District Judge did give very close attention to the condition of this case, and arrived at what he thought was the value the landowner was entitled to, which was based not upon the testimony of the landowners' competent witnesses as to value, but did consider their testimony and doubtless some of the testimony of the witnesses for petitioner in their description of the type of land that it was, the location of it, the productivity of it, which was indeed great, and other descriptions, and knowing that a clear error had been made, he fixed the amount which the landowner was entitled to, that is, he exercised his authority under the very wording of the rule, namely, he modified what had been done by the Commission, and found what he thought was thoroughly supported by the proof on which he relied.

Now Judge Miller discussed these matters thoroughly in his opinion, and stated very clearly and positively that he understood his rights and the limit of his jurisdiction, and he exercised it, based upon facts shown in the record, and we insist for this landowner, who has been worried and harassed for a period of some eight years, that this petition be denied. It certainly is not enough, but the landowners state to the Court, through their attorney, in this answer that they prefer to accept what they have been adjudged to be entitled to rather than to have a new trial, unless they were at the same time allowed a jury of their peers to try the case.

Now the petitioner charges in its Petition that there is no evidence in the record to justify the District Judge in adding the amount to the report found by the Commission. This statement cannot be justified by the facts. The Judge states on which he based his judgment and, among

other things, it was the description of the land made by all witnesses, the location it occupied, the type of crops raised on it each and every year prior to the taking, and the fertility that it produced, which, of course, was the most valuable of all proof. Now let's consider this from the standpoint of the productivity of that land. Take, for illustration, the 36 acres which were taken from the defendants, and it was agreed that the Government should pay its full value. Now, what was the landowner using this land for, what kind of crop? We will only consider one small portion of it—3.35 acres of dark-fired tobacco, and 1.09 acres of burley tobacco. Now it is commonly known by all farmers, and many others, that these two crops are very valuable indeed. When a man comes to consider the value of that 36 acres, as a whole, which the landowner was entitled to, he will give consideration to it considerably under what the average per acre is, there and every where else in this area. It usually runs over 2,000 lbs. of burley per acre, but we are only going to consider, to be conservative, 1,500 lbs. per acre, and there being 1.09 acres, it would be 1,635 lbs. each year,—and that tobacco in the area that was sold from this farm has been selling for quite some time at the rate of from 67¢ to 75¢ per lb., and if you figure the value of this tobacco to bring 70¢ per lb., it would be $1470.50, and the other allotment that he had of 3.35 acres of dark-fired tobacco, and he cultivated fully these allotments in both instances.

Now, of course, it is commonly known that dark-fired tobacco weighs considerably heavier than burley tobacco, and it was selling all the way from 45¢ to 47¢ per lb. Figure it at 1600 lbs. per acre (and I have no doubt in the world that it was more than that) and as low as 40¢ per lb. is $6,400.00 per year. Now add the amounts that he received from both dark-fired and burley tobacco. He received an average of $7,870.00. Now when anybody

fixes a value on a tract of land of 36 acres, and for a period of a number of years prior to the date of taking it was bringing $7,870.00; would that not give a person so considering some proof as to what that land was worth on the market? Now two of the Government witnesses valued this land of 36 acres at $40.00 an acre, which would be $1,440.00 for a tract of land that was producing more than $7,000.00 each and every year in gross profits.

I am making the above figures based upon not direct information as to what was received because this does not appear in the record, but I think we have a perfect right to use it in this instance because the facts concerning the number of acres, etc. does appear in the record. Of course, the expense of cultivating these crops would be deducted from the amount so far as net profit is concerned. The owner did a great deal of his work himself, and I do not know the expense that it cost or what portion of it he collected as net profit, but the fact that land will produce that amount of value has a great deal to do with its value on the market. Therefore, the $23,950.00 allowed by the Commission was not any ways near accurate amount. It was so clear and positive that any one giving it consideration, with any idea of being fair, could not argue that that was the amount that the landowner was entitled to. I have no doubt in the world that this land of 36 acres realized, grossly speaking, certainly from $5,000.00 to $7,000.00 per year without any doubt whatsoever. In fact, the individual that is dictating this Answer, raises tobacco himself, and has raised it for a number of years, and knows a great deal about it.

The landowners also, of course, state that the $29,500.00 that the Judge allowed is still not any ways near the amount they should have had, but, as has been said hereinbefore, the landowners prefer to accept it as full compensation on account of the great amount of harassment, delay and expense, unless it is ordered to be tried again

by a jury, and not to grant the writ of certiorari because it is the insistence of the landowners that there is no basis for this to be ordered.

During the trial of this case in the Court of Appeals at Cincinnati the attorney representing the petitioner herein expressly stated that if Judge Miller had given to the landowners the sum of $47,000.00, instead of $29,500.00, that this case would not have been appealed. This clearly demonstrates that he recognized that the Report of the Commission was inadequate and insufficient. The $47,000.00 was the least amount that any witness for the defendant testified. Nowhere in any of the pleading of the petitioner has it ever insisted that the Commission gave the landowners a sufficient amount of money for their land.

It is also well to state that the Commission itself did not give any attention or consideration, or at least very little, to the testimony of the petitioner's witnesses. In fact, stated positively that they could not, and Judge Miller stated in his opinion, which clearly showed much investigation on his part, that there was absolutely no proof that the petitioner's witnesses were at all familiar with or knew anything about the condition the land was in on the day it was taken, but they made their appraisal on what they saw three years and three months after the land was taken and after it had been covered with water several different times, and it was not really seen, as was required, by the witnesses, and all Courts say that the market value of the land must be shown as of the day it was taken and the condition the land was in. Now there is not one word of evidence in the record that undertakes to show that the land was in the same condition on the day it was taken as it was when they appraised it.

As a matter of fact the only reason that this suit was filed was to determine the just compensation for the land-

owner. A great many Courts have said so. There are cases that hold directly and positively that a case similar to this, where there is no dispute of the right to condemn, that the sole object of a case of this kind is to reach just compensation for the landowner. In the case of **United States v. 93970 Acres, more or less, Cook County, Ill.**, 258 F. (2d) 17, it is stated:

> "The sole object of condemnation proceedings is to ascertain just compensation for that which is taken."

There are numerous cases that hold that the landowner must be paid the market value of the land in the condition it was in on the day it was taken. To illustrate this, in the case of **United States v. 15-3 Acres**, 154 F. Supp. 770, this language is used:

> "Just compensation for condemned property is to be ascertained as of the date of the taking."

Now even if the petitioner's witnesses could be regarded as experts, they must put a value on the property taken on the day it was taken and the condition it was in, and there is not one line that indicates what condition that land was in on January 9, 1962, the date it was taken, but they made their so-called appraisal on what they saw three years and three months later, and there is no proof of any type or character that it was in its same condition. Therefore, of course, we think the witnesses were incompetent to testify.

We respectfully submit that simply because a man is called an expert does not make him such. The difference between an expert and one who is not is the knowledge of the expert over and above that of the other party. Now to compare the so-called experts in this case as having more information about these lands and their productivity and their value than that of the witnesses of the landowners, of course, cannot possibly be insisted upon or even

presented with any degree of hopeful results. The witnesses who testified for the landowners knew this land as well as the landowners could have known it, and had known it, some of them, for as much as fifty years, and at least one of them more than sixty years, and they lived in that community and knew every sale of any farm that was had a great many years prior to January 9, 1962, and they said there was none comparable to this farm, and the effect of their testimony with reference to the little tract that sold adjoining this farm was to say that it was comparable in no way, shape, form or fashion to the land involved here, and there was as much difference in it and the land involved as midnight and 12 o'clock noon.

In conclusion let us say that the District Judge, after much consideration, motions to reconsider, and writing of opinion, he clearly held that the amount given to the landowners by the Commission was clearly an error, and it was his duty to correct the same, which he undertook to do. The case that was cited in the Petition is that of **United States v. Merz**, 376 U. S. 192. This is the rule that is relied upon by the petitioner in its Petition, and it seems to us to be clear, which was stated as follows:

> "(1) the United States was entitled to take the property and the landowners were entitled to just compensation; (2) just compensation was to be determined by subtracting the value of the landowners' interests immediately after the taking from their value immediately before the taking."

Now the difference in the testimony of the witnesses on both sides was that the witnesses testifying for the plaintiff therein valued the land, without knowing anything about its condition on the day it was taken, three years and three months later. While the witnesses for the defendants knew the land and its condition on the day it was taken, and so testified, and they also knew all about the land and had known it for many years.

It seems to us that it is clearly easy to understand that the award of the Commission was far less than the landowners were entitled to. As said by the District Judge, it was clear error, and he said it on several occasions. The Court of Appeals said exactly the same thing and affirmed his decision and the exercise of his authority, and the landowners had announced that they would prefer this to be done than to ever let it go back to this Commission again, and this is what we insist upon at this time, unless the Court should see proper to order the same to be tried by a jury.

The District Judge delivered two opinions on this proposition of finding that the amount awarded by the Commission was clearly an error, and he discriminated the case at bar to any and all that had been cited by the Government, the main difference being, on which he said the petitioner's witnesses were not properly qualified, was not that an expert could not testify concerning, but it must be that he testified with reference to the land that was taken on the day it was taken and on the condition it was in on that day, and their testimony was based entirely upon what they saw three years and three months after it was taken, and he also held that there was not one word of evidence in the record to qualify these men by showing that the land was in the same condition when it was taken as it was at the time they saw it.

A great many condemnation cases filed in the District Court at Nashville, Tennessee were heard and determined by the Commission prior to this one, and many of them were excepted to by the landowner, and this case was the only one that he had ever held to be clearly an error, and he affirmed the opinion of the finding of the Commission in all except this one.

Therefore, we respectfully ask the Court to deny this Petition and settle this case, thereby relieving the de-

fendant of further worry and expense, unless this Honorable Court orders the case to be tried by a jury.

Respectfully submitted,

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